# Re Kai Peng Berhad

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D5–24–11 OF 2007
RAMLY ALI J
16 MAY 2007

*Companies and Corporations — Arrangement, scheme of — Court approval — Applicant company obtaining order to convene meeting to consider scheme — Whether scheme reasonable and fair to all classes of creditors*

*Companies & Corporations — Arrangement, scheme of — Restraint of proceedings — Extension — Whether application to extend restraining order was still effective*

*Companies & Corporations — Arrangement, scheme of — Arrangement between company and creditors — Whether an application under s 176(10A) Companies Act 1965 could be dealt with ex parte*

The applicant sought leave to convene separate meetings for different classes of secured and unsecured creditors for the purpose of a scheme of arrangement and an interim restraining order preventing any action or proceeding against the applicant. The court allowed the restraining order for a 90-day period which ran its course. The applicant had proposed a scheme of arrangement and were under consideration by the Securities Commission. The applicant, unable to convene the meetings until approval was obtained, applied to extend the said restraining order for a further 90 days. The application for extension was opposed by two secured creditors.

**Held,** dismissing the objections of the opposing creditors and allowing the extension:

(1) All the provisions of s 176(10) of the Companies Act 1965 ('the CA') must be met before the grant of any extension of a restraining order. A restraining order may only be extended for such longer period for 'good reasons' and 'if and only if' conditions (a) to (d) of s 176(10A) were satisfied and hence been reasonable progress towards the achievement of a viable and feasible creditors' scheme of arrangement (see para 10); *Metroplex Bhd & Ors v V Morgan Stanley Emerging Markets Inc & Ors; RHB Sakura Merchant Bankers Bhd & Ors (Interveners)* [2005] 6 MLJ 487 (folld).

(2) The words 'good reason' mean that; (a) a bona fide scheme of arrangement had been proposed and presented with sufficient details provided to the creditors to enable them to make informed decisions as to its feasibility and merits, (b) the scheme of arrangement proposed and presented must not be such that it was

bound to fail, and (c) the interest of the creditors, the beneficiaries of the proposed arrangement was safeguarded. The paramount consideration in a s 176 application was the safeguarding of the welfare of the creditors (see paras 11, 13); *Re Kuala Lumpur Industries Berhad & Ors* [1990] 2 MLJ 180 (folld); *Twenty First Century Oils Sdn Bhd v Bank of Commerce (M) Bhd & Ors (No 2)* [1993] 2 MLJ 353); and *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1990] 2 MLJ 31 (folld).

(3) Section 176(10A)(a) does not require that more than 50% of it's creditors approve of the proposed scheme of arrangement. The creditors' approval was only relevant at the stage of the creditors meeting ordered under s 176(3) of the Companies Act, not at the stage of asking for an extension of the restraining order under s 176(10A). All the applicant needed to show was that the scheme, as proposed, involved more than 50% of all its creditors (see paras 15, 16).

(4) The proposed scheme has to be first approved by the relevant authorities, including the Securities Commission, before being tabled at the creditors meeting. The prayer seeking leave to convene separate meetings was still pending because the Securities Commission had yet to give its approval. The Securities Commission had not rejected the scheme outright. Thus, the court was satisfied that an extension of the restraining order was necessary to enable the applicant and it's creditors to formalise the scheme for the approval of the creditors (see paras 22, 23).

(5) The appointment of the director had been consented to by the creditors forming the majority, thus complying with s 176(10A)(d). Although one of the creditors was a wholly-owned subsidiary of the applicant, it formed only 16.22% out of the 59.9%. At this stage of the proceeding, all the creditors can be grouped together for the purpose of appointing a director under s 176(10A)(d) of the Companies Act since the subsidiary does not stand to benefit more than the other unsecured creditors (see paras 24–29).

(6) The proposed scheme took care of all the creditors of the applicant, secured as well unsecured, irrespective of whether they were subsidiaries of the applicant or not. All the unsecured creditors are to be treated equally if the scheme was approved. There was no evidence of divergence of interest between the applicant's subsidiaries and the other unsecured creditors. A substantial part of the unsecured creditors support the subsidiary creditors' views on the nomination of the director of the applicant. There was no unfairness in grouping the subsidiary with the rest of the creditors to support the said nomination at this stage of the proceeding (see para 29).

(7) The applicant company in its present application for an extension of the restraining order had met afresh all the requirements found in s 176(10A) of the Maybank. The court was satisfied that there were 'good reasons' to allow such an extension. The opposing creditors' opposition had failed to cast any doubt to the said 'good reasons'. Therefore, the court overruled the opposition and allowed the applicant's application for an extension of the restraining order for the period of 90 days from 25 April 2007 with costs.

**[Bahasa Malaysia summary**

Pemohon telah memohon satu kebenaran mengadakan mesyuarat-mesyuarat bagi kelas-kelas berlainan pemiutang bercagar dan pemiutang tak bercagar untuk tujuan-tujuan rancangan penyusunan sementara perintah penyekatan menghalang sebarang tindakan atau prosiding terhadap Pemohon. Mahkamah telah membenarkan Perintah Pencegahan untuk tempoh selama 90 hari yang telah bermula. Pemohon telah mencadangkan rancangan penyusunan dan cadangan-cadangan ini adalah di bawah seliaan Suruhanjaya Sekuriti. Pemohon, tidak dapat mengadakan mesyuarat-mesyuarat tersebt melainkan mendapat peersetujuan, telah memohon untuk melanjutkan Perintah Pencegahan untuk tempoh selama 90 hari. Permohonan untuk perlanjutan telah ditentang oleh dua pemiutang bercagar.

**Diputuskan,** menolak bantahan bagi pemiutang yang menentang dan membenarkan perlanjutan.

(1) Kesemua peruntukkan dalam s 176(10) Akta Syarikat 1965 mestilah dipenuhi sebelum memberikan sebarang perlanjutan Perintah Pencegahan. Perintah Pencegahan hanya boleh dilanjutkan untuk tempoh yang lebih panjang bagi 'alasan-alasan yang baik' dan "jika dan hanya' syarat-syarat (a) sehingga (d) s 176(10A) dipenuhi dan terdapat kemajuan yang munasabah kearah mencapai rancangan penyusunan pemiutang yang berdaya maju dan boleh dilaksanakan (lihat *Metroplex Bhd & Ors v V Morgan Stanley Emerging Markets Inc & Ors*; *RHB Sakura Merchant Bankers Bhd & Ors (Interveners)* [2005] 6 MLJ 487 (dirujuk).

(2) Perkataan 'alasan-alasan yang baik' bermaksud bahawa (a) niat suci rancangan penyusunan yang telah dicadangkan dan dibentangkan, dengan butiran-butiran yang mencukupi yang telah disediakan kepada pemiutang-pemiutang bagi membolehkan mereka membuat keputusan-keputusan berkenaan dengan perlaksanaan dan baik buruknya, (b) rancangan penyusunan yang telah dicadangkan dan dibentangkan mestilah bukan sesuatu yang akan gagal, dan (c) kepentingan pemiutang-pemiutang, orang yang mendapat manfaat dari rancangan penyusunan, adalah dilindungi. Yang terakhir itu merupakan pertimbangan paling utama dalam sesuatu permohonan (lihat*Re Kuala Lumpur Industries Berhad & Ors* (1990) 2 MLJ 180 (dirujuk); *Twenty First Century Oils Sdn Bhd v Bank of Commerce (M) Bhd & Ors (No 2)* [1993] 2 MLJ 353); and *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1990] 2 MLJ 31.

(3) Seksyen 176 (10A)(a) tidak memerlukan lebih daripada 50% pemiutang-pemiutang bersetuju terhadap rancangan peyusunan yang dicadangkan itu. Persetujuan pemiutang-pemiutang hanya terpakai pada peringkat mesyuarat pemiutang yang diperintahkan di bawah s 176(3) Akta tersebut, bukan pada peringkat meminta perlanjutan perintah pencegahan di bawah s 176(10A). Sekarang, semua pemohon perlu menunjukkan bahawa rancangan sebagiamana yang dicadangkan, melibatkan lebih daripada 50% daripada keseluruhan pemiutang-pemiutangnya.

(4) Rancangan yang telah dicadangkan hendaklah dipersetujui oleh pihak-pihak berkuasa, termasuklah Suruhajnjaya Sekuriti, sebelum dibentangkan pada mesyuarat pemiutang. Tuntutan bagi mendapatkan satu kebenaran untuk mengadakan mesyuarat berasingan adalah masih tertangguh kerana Suruhanjaya Sekuriti masih belum memberikan persetujuan. Suruhanjaya Sekuriti tidak pula secara nyatanya menolak rancangan tersebut. Dengan itu, mahkamah berpuas hati bahawa perlanjutan perintah pencegahan adalah perlu bagi membolehkan pemohon dan pemuitang-pemiutangnya untuk memformalkan rancangan tersebut untuk persetujuan pemiutang-pemiutang.

(5) Perlantikkan pengarah telah diberikan kebenaran oleh pemiutang-pemiutang majoriti, dengan itu telah mematuhi s 176(10A)(d). Walaupun salah satu daripada pemiutang-pemiutang adalah anak syarikat milik penuh pemohon, ia hanya membentuk 16.22% daripada 59.99%. Pada peringkat prosiding ini, semua pemiutang boleh dikumpulkan bersama-sama bagi melantik pengarah di bawah s 176(10A)(d) Akta tersebut memandangkan anak syarikat tidak akan memperolehi manfaat lebih daripada pemiutang tak bercagar yang lain.

(6) Rancangan yang dicadangkan mengambil kira semua pemiutang-pemiutang pemohon, bercagar dan juga tak bercagar, tidak kira sama ada mereka adalah anak syarikat pemohon atau tidak. Kesemua pemiutang tak bercagar hendaklah dilayan secara sama rata jika rancangan ini dipersetujui. Tiada bukti terdapat perbezaan kepentingan antara anak syarikat pemohon pemiutang tak bercagar yang lain. Sebahagian besar pemiutang tak bercagar menyokong pendapat anak syarikat pemiutang di atas pencalonan pengarah pemohon. Tidak terdapat ketidakadilan dalam mengumpulkan anak syarikat dengan pemiutang-pemiutang lain bagi menyokong pencalonan yang dinyatakan pada peringkat prosiding ini.

(7) Pemohon syarikat di dalam permohonan masakini bagi pemanjangan perintah pencegahan telah menemui kesemua keperluan-keperluannya dalam s 176(10A) Maybank. Mahkamah adalah berpuas hati bahawa terdapat alasan-alasan baik bagi pemanjangan perintah pencegahan untuk tempoh 90 hari dari 25 April 2007 dengan kos.]

**Notes**

For cases on court approval, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 25–28.

For cases on restraint of proceedings, see 3(1) *Mallal' Digest* (4th Ed, 2003 Reissue) paras 31–35.

**Cases referred to**

*Kuala Lumpur Industries Berhad & Ors, Re* [1990] 2 MLJ 180 (folld)

*Metroplex Bhd & Ors v V Morgan Stanley Emerging Markets Inc & Ors; RHB Sakura Merchant Bankers Bhd & Ors (Interveners)* [2005] 6 MLJ 487 (folld)

*Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1990] 2 MLJ 31 (folld)

*Twenty First Century Oils Sdn Bhd v Bank of Commerce (M) Bhd & Ors (No 2)* [1993] 2 MLJ 353 (folld)

**Legislation referred to**

Companies Act 1965 ss 176(1), (3), (10), (10A)(a), (b), (c), (d)

*V Manokaran (PY Chong with him) (Nordin Torji & Partners) for the applicant.*
*John Skelchy (SN Raj with him) (Zaid Ibrahim) for the opposing creditor of GEA Power Cooling System.*
*CS Mong for the Opposing Creditor of Maybank.*

**Ramly Ali J:**

**[1]** Enclosure 8 is the applicant's application seeking for an order that the restraining order dated 24 January 2007 ('the restraining order') be extended for a further period of 90 days. The said restraining order had expired on 24 April 2007 and it had been extended till 7 May 2007 by way of an ad interim order dated 19 April 2007.

**[2]** The grounds for an extension of the restraining order are as follows:

(a) a draft scheme of arrangement had been forwarded to the Securities Commission on 14 February 2007 for approval, however, as to date, the applicant is yet to receive the said approval from Securities Commission; and

(b) therefore the applicant company is unable to proceed further, ie, to convene a creditors meeting in respect of the scheme of arrangement within the initial validity period of the restraining order.

**[3]** Earlier on, vide encl 1, the applicant applied by way of an ex parte originating summons filed pursuant to s 176(1) and (10) of the Companies Act 1965 ('the CA') for, inter alia, orders that:

(a) the applicant be given leave to convene separate meetings to be held in respect of separate classes of creditors described as the secured creditors and unsecured creditors for the purpose of considering and if thought fit, approving with or without modification, the scheme of arrangement proposed to be made between the applicant and its creditors; and

(b) a restraining order be granted preventing any action or proceedings against the applicant including but not limited to winding-up execution and arbitration proceedings.

**[4]** The court dealt with prayer (b) on 24 January 2007 and allowed the restraining order for a period of 90 days (from 24 January 2007) pending the hearing of the remaining prayer (a) of the application as the relevant approvals from the regulatory authorities had not been obtained. The initial period of 90 days ended on 24 April 2007. The applicant then filed an application by way of a summons in chambers (vide encl 8) to extend the said restraining order for a further period of 90 days. The said application came up for hearing on 19 April 2007 where it was ordered that the opposing creditors, namely GEA Power Cooling System Inc and Maybank, be formally made parties to the proceedings.

A THE PROPOSED SCHEME OF ARRANGEMENT

**[5]** The proposed scheme of arrangement envisages the following:

(i) The transfer of the listing status of the applicant to a new company (NewCo) by a share-swap exercise, full details of which are found in exh P–13;

(ii) The acquisition of Maju Steel (a wholly owned subsidiary of the applicant) by NewCo by issuance of NewCo shares to the applicant for purposes of partial settlement to the unsecured creditors. Maju Steel is the on-going steel related business in the applicant's group which had advanced a sum of RM28.9m to the applicant and had assisted the applicant's cash-flow (see exh P–13, para 2 and 3);

(iii) The injection of fresh funds into NewCo by way of special placement and rights issue amounting to RM12.6m a significant portion of which would be available a working capital for the NewCo; and

(iv) all other remaining subsidiaries of the applicant including the applicant will eventually be liquidated and the unsecured creditors may still benefit from the realisation of the assets subsequent to the said liquidation.

**[6]** As at 30 September 2006, the applicant has liabilities amounting to RM53m, comprising borrowings of RM10m, an amount owing to subsidiary companies of RM29.1m, and trade and other payables of RM13m, including RM10.8m owing to GEA Power Cooling System Inc. In addition, there are amounts owing by the applicant arising from corporate guarantees granted by the applicant to certain lenders of its subsidiary companies, amounting to RM49.7m.

**[7]** The amount owed by the applicant to the opposing creditors, namely GEA Power Cooling System Inc is RM10.8m and Maybank is RM719,369.

G GROUNDS FOR OPPOSING THE APPLICATION

**[8]** The opposing creditors oppose the application on the following grounds:

(a) the applicant has failed to comply with the mandatory statutory prerequisites necessary for the granting of an extension of a restraining order pursuant to s 176(10A) of the Companies Act 1965;

(b) there is no useful purpose of sanctioning a creditors meeting under s 176(1) as the applicant has failed to show that the scheme would obtain the approval of the statutory majority required;

(c) the scheme as presently envisaged is vague and uncertain and fails to show any credible or bona fide proposal or scheme of arrangement;

(d) the scheme (which does not even have the requisite regulatory approvals) and this Application are merely devices to avoid making valid payments; and

(e) the scheme would be contrary to public policy. A

APPLICABLE LAW

**[9]** The applicable law relating to an application for an extension of the restraining order is provided under s 176(10A) of the CA which reads as follows: B

(10A) The court may grant a restraining order under sub-section (10) to a company for a period of not more than ninety (90) days or such longer period as the court may for good reason allow if and only if —

(a) it is satisfied that there is a proposal for a scheme of compromise or arrangement between the company and its creditors or any class of creditors representing at least one-half in value of all the creditors; C

(b) the restraining order is necessary to enable the company and its creditors to formalise the scheme of compromise or arrangement for the approval of the creditors or members pursuant to sub-section (1); D

(c) a statement in the prescribed form as to the affairs of the company made up to a date not more than three (3) days before the application is lodged together with the application; and

(d) it approves the person nominated by a majority of the creditors in the application by the company under sub-section (10) to act as a director or if that person is not already a director, notwithstanding the provisions of this Act or the memorandum and articles of the company, appoints the person to act as a director. E

**[10]** The law on extension of restraining order requires all the provisions of s 176(10) of the CA to be met afresh in order to empower the court to grant any extension of the restraining order. A restraining order may only be extended for such longer period for 'good reasons' and 'if and only if' conditions (a) to (d) of s 176(10A) have been satisfied and where there has been reasonable progress towards the achievement of a viable and feasible creditors' scheme of arrangement (see *Metroplex Bhd & Ors v V Morgan Stanley Emerging Markets Inc & Ors; RHB Sakura Merchant Bankers Bhd & Ors (Interveners)* [2005] 6 MLJ 487). All of conditions (a) to (d) must be satisfied. There must also be 'good reason' for allowing such an extension. F G

**[11]** The words 'good reason' have been construed by the courts to mean that:

(a) a bona fide scheme of arrangement has been proposed and presented, with sufficient details provided to the creditors to enable them to make informed decisions as to its feasibility and merits (see *Re Kuala Lumpur Industries Berhad & Ors* [1990] 2 MLJ 180); H

(b) the scheme of arrangement proposed and presented must not be such that it is bound to fail (see *Twenty First Century Oils Sdn Bhd v Bank of Commerce (M) Bhd & Ors (No 2)* [1993] 2 MLJ 353); and I

(c) the interest of creditors, that is, the beneficiaries under the proposed arrangement is safeguarded (see Sri *Hartamas Development Sdn Bhd v MBf Finance Bhd* [1990] 2 MLJ 31).

**[12]** In *Re Kuala Lumpur Industries Bhd & Ors*, VC George J held that:

> In making a section 176(10) order, there must be a proposal of the scheme of compromise or arrangement (not necessarily ready for presenting to the creditors to be voted upon) but with sufficient particulars to enable the court to assesses that it is feasible and merits due consideration by the creditors when it is eventually placed before them in detailed form...

**[13]** The paramount consideration for the court in a s 176 application is the safeguarding of the welfare of the creditors. In that respect the question that the court should apply its mind in exercising its discretion is 'would the creditors be in a better position by the implementation of the proposed scheme of arrangement as opposed to the company being liquidated'.

**[14]** The opposing creditors have contended that the applicant failed to show that there is a valid bona fide proposal for a scheme between the company and at least half of its creditors on grounds that:

(i) while the applicant contends that two creditors, namely Capital Network Sdn Bhd and Maju Alat Ganti Sdn Bhd, have agreed to the scheme, these creditors merely represent approximately 30.19% of the total creditors; and

(ii) further Maju Alat Ganti Sdn Bhd is a wholly owned subsidiary of Maju Steel Sdn Bhd which in turn is a wholly owned subsidiary of the applicant and should not be taken to represent the views of the general body of creditors of the application.

**[15]** The opposing creditors are of the view that s 176(10A)(a) requires the applicant to show proof that more than 50% of it's creditors have approved the proposed scheme of arrangement.

**[16]** This is an erroneous construction of the said sub-section. The said sub-section provides for no such requirement. If such approval of the creditors is required (at that stage of the scheme) why then the requirement in s 176(3) of the Act for the proposed scheme to be approved at the creditors meeting. Approval of the creditors is only relevant at the stage of the creditors meeting ordered by the court under s 176(3) of the Act, but not at the stage of asking for an extension of the restraining order under s 176(10A). A proper construction of s 176(10A)(a) will show that all the applicant needs to show is that the scheme as proposed, involves more than 50% of its creditors.

**[17]** The creditors here means 'all creditors' of the applicant which include secured and unsecured creditors. All creditors must be taken into consideration irrespective of whether they are subsidiaries or non-subsidiaries of the applicant.

**[18]** In the present case, it can be seen that the proposed scheme is applicable and covers all its creditors subsidiaries as well as non-subsidiaries. In other words there would be no creditors who would be left out of the proposed scheme. All will be involved. As long as 50% of its creditors can avail themselves of the proposed scheme, the statutory requirement under s 176(10A)(a) would be fulfilled.

**[19]** The details of the proposed scheme clearly show that the creditors being shareholders of the NewCo under the proposed scheme would benefit from the scheme. The said scheme is a feasible scheme and highly unlikely to fail if approval is obtained from the Securities Commission as the creditors will be able to get paid more compared to if the applicant company is being would up. If the applicant company is being wound up, the unsecured creditors of the applicant company will only be paid a very minimal amount ie about 0.03% or even nil. It would be erroneous for the opposing creditors to state that the scheme is vague, uncertain and fails to show any credible or bona fide proposal or scheme of arrangement.

**[20]** The opposing creditors have also contended that the applicant has failed to provide an accurate and complete statement of affairs of the company made up to a date not more than three days before the application is lodged. In this regard the opposing creditors argued that while the applicant's financial statements contained in the latest annual report indicate that the applicant has secured creditors, the statement of affairs fails to provide or make reference to the secured creditors.

**[21]** The court is of the view that this contention by the opposing creditors is clearly baseless and erroneous. In the present case, the applicant on 6 April 2007 filed the statement of affairs in prescribed form disclosing the statement of assets and liabilities of the applicant as at 5 April 2007 which is one day prior to the filing of the application. The prescribed form provides for secured creditors under schedule D of the statement of affairs (see: lampiran 9, exh P23). Therefore, the court is fully satisfied that the requirement under s 176(10A)(c) has been fulfilled.

**[22]** The proposed scheme involves all the creditors of the applicant. It has to be first approved by the relevant authorities including the Securities Commission, before being tabled at the creditors meeting. Prayer (1) of the applicant's originating summon prays for leave to convene separate meetings to be held in respect of separate classes of creditors for the purpose of considering and, if thought fit, approving the said scheme of arrangement. That application is still pending in this court in view of the fact that the Securities Commission has yet to give its approval on the proposed scheme. There was reasonable progress towards their achievement. The applicant through it's agent, MIDF Amanah Investment Bank Bhd had on 14 February 2007 submitted the proposed scheme to the Securities Commission. On 7 March 2007, the Securities Commission requested for certain information to be provided in relation to the scheme. The information was submitted on 15 March 2007. On 29 March 2007, the Equity Compliance Unit of the Securities Commission requested for some information. The information was submitted on 10 May 2007. On 3 May 2007 the Securities Commission again requested for certain information and clarification in relation to the scheme. The applicant and its advisers are currently in the midst of compiling all the necessary information for submission to the Securities Commission.

**[23]** To date, the Securities Commission has not rejected the scheme outright. The applicant here has a proposed scheme of arrangement which is pending the approval of the Securities Commission and the applicant too had applied for an order of this court for leave to convene a creditors meeting which is yet to be heard pending

A the approval of the Securities Commission. Under such circumstances, the court is fully satisfied that such an extension of the restraining order as applied for by the applicant is really necessary to enable the applicant and it's creditors to formalise the scheme for approval of the creditors. This requirement under s 176(10A)(b) is also fulfilled.

B

**[24]** The opposing creditors have also contended that the applicant has failed to show that there is a director nominated by the majority of the creditors, the approval of whom the court should approve under s 176(10A)(d) of the CA. The opposing creditors further contended that:

C

(i) the applicant has failed to show that the candidate was in fact approved by a majority of the applicant's creditors. In this regard, the creditors who nominated the directors (Maju Steel Sdn Bhd, MDV Berhad and EON Bank) merely represents approximately 32.8% of the total creditors;

D (ii) the actual percentage of representation of Maju Steel Sdn Bhd of the total body of creditors would be further diluted, in the event that the applicant's secured creditors are taken in account; and

(iii) further Maju Steel Sdn Bhd is a wholly owned subsidiary of the applicant and should not be taken to represent the views of the general body of creditors of the application. In this instance the opposing creditors alleged the creditors supporting the appointment of the director merely represents 16.6% of the total creditors.

E

F **[25]** The court cannot agree with the opposing creditors on this issue. In this case the appointment of the said director, Dato Wan Ismail bin Abdul Rahman is consented to by the following creditors, namely:

(i) Maju Steel Sdn Bhd being 16.22% of the creditors;

G (ii) Maju Alat Ganti Sdn Bhd being 22.08% of the creditors;

(iii) Malaysia Debt Venture being 11.89% of the creditors;

(iv) EON Bank Berhad being 4.71% of the creditors; and

(v) CIMB being 5.1% of the creditors.

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**[26]** The respective percentages above are gathered from the figures available in the statement of affairs taking into account that the total amount of debt owed to all creditors by the applicant is RM79,289,382. As can be seen the value of the creditors making the nomination of Dato Wan Ismail bin Abdul Rahman comes to 59.99% which forms the majority and therefore complying with s 176(10A)(d).

I

**[27]** The opposing creditors further contended that Maju Steel Sdn Bhd is a wholly-owned subsidiary of the applicant and therefore, should not be taken to represent the views of the general body of creditors of the applicant.

**[28]** As can be seen from the facts submitted before the court, 59.9% of the unsecured creditors have shown their support for the nomination of Dato Wan Ismail for appointment as a director of the applicant. Maju Steel Sdn Bhd forms only 16.22% out of the 59.9%. A

**[29]** In the present case, the proposed scheme takes care of all the creditors of the applicant, secured as well unsecured, irrespective of whether they are subsidiaries of the applicant or not. All the unsecured creditors are to be treated equally if the scheme is approved. At this stage of the proceeding, ie, at the stage of application for extension of the restraining order under s 17B(10A) of the CA, all the creditors can be grouped together for the purpose of appointing a director under s 176(10A)(d) of the Act. There is no evidence of divergence of interest between the applicant's subsidiaries and the other unsecured creditors. The opposing creditors who oppose the application have failed to adduce such evidence. The subsidiary in the present case (Maju Steel Sdn Bhd) does not stand to benefit more than the other unsecured creditors. The evidence shows that a substantial part of the unsecured creditors support the subsidiary creditor's views on the nomination of Dato Wan Ismail as a director of the applicant. There would therefore be no unfairness in grouping Maju Steel Sdn Bhd with the rest of the creditors to support the said nomination at this stage of the proceeding. B C D

**[30]** In any event, the court has the final say to determine if the director nominated should be approved and appointed. The court will look at the credentials and be satisfied that he has no direct or indirect interest in the applicant or any of the subsidiaries. In this case, the court accepts his appointment based on his impeccable credentials which would remove all doubts that he would act in concert with any quarter to the disadvantage over the others. He has no interest directly or indirectly in the applicant and is totally independent and has no conflict of interest in representing the creditors. E F

**[31]** The opposing creditors also argued that there is no useful purpose of sanctioning a creditors meeting as the scheme is likely to fail for failure to obtain approval of statutory majority required under s 176(3) of the CA. G

**[32]** This argument is without merit, and baseless. The court cannot anticipate what would be the decision or resolution of the creditors meeting which has not been held yet. It is up to all the creditors or classes of creditors to deliberate on the issue at their respective meetings and to resolve the matter. Therefore, that issue would not be a reason for the court not to sanction the meeting or to extend the restraining order as requested by the applicant in the present case. H

**[33]** The operative words in s 176(3) of the CA are '... three fourths in value of the creditors or class of creditors'. In this case GEA and MBB (both the opposing creditors) are the only creditors who have indicated opposition to the scheme. Combined, they make only 14.53% of the value of the creditors. The remaining 85.47% of the value of the creditors have yet to decide. Their contention that there would be no possibility of the statutory required percentage being obtained favouring the scheme is therefore baseless. Even if the subsidiaries, ie, Maju Steel Sdn Bhd and I

A Maju Alat Ganti Sdn Bhd are excluded from voting, GEA Power Cooling System Inc and Maybank, the opposing creditors, merely have a combined percentage of 23.54% opposing the scheme. The balance (76.46%) if they vote in favour would satisfy the statutory requirement.

B CONCLUSION

**[34]** The applicant company in its present application for an extension of the restraining order had met afresh all the requirements found in s 176(10A) of the Maybank. The court is satisfied that there are 'good reasons' to allow such an extension as applied. The opposing creditors' opposition has failed to cast any doubt to the said 'good reasons'. Therefore the court overrules the opposition and allows the applicant's application for an extension of the restraining order for the period of 90 days from 25 April 2007 with costs.

C

*Application for extension of restraining order allowed.*

D

Reported by Sivapragasam Kumaran

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